

# ATTACHMENT 7

1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 This is the 17th day of January 20008 This is the 17th day of i

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF SOUTH CAROLINA

4 COLUMBIA DIVISION

5  
6 Avondale, incorporated ) Ca. NO. 1:05-2817

7 Plaintiff, ) COLUMBIA, SC

8 ) february 16, 2007

9 )  
10 VERSUS )

11 )  
12 norfolk southern corp., et )

13 Et al., )

14 Defendants. )

15 )

16  
17 BEFORE THE HONORABLE margaret b. Seymour

18 UNITED STATES DISTRICT COURT JUDGE

19 Telephone conference

20  
21 APPEARANCES:

22  
23 FOR THE plaintiff: TERRY RICHARDSON, esq.

24 Richardson, patrick, westbrook

25 And brickman

## 1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 valuations and say, all right, the Court has ruled that  
2 immediately before the derail ~ment is not the appropriate  
3 time. Of course, we disagree with that. But the Court has  
4 said we must present our counter valuations accepting Mr.  
5 Taylor's May 26, 2000 /#\*6 date and that is going to require  
6 substantial amount of work for our experts to do that. They  
7 just can't take that off-the-shelf and stick in it to their  
8 reports. I have had occasion to talk to all of our financial  
9 experts in the last couple of weeks for reasons related to  
10 motion docket entry 986 which I will address in a minute and  
11 they are all extremely busy right now and it is very difficult  
12 to get a time from them at this late point, but if that is  
13 the Court's ruling it seems to require to us go back and have  
14 them redo their analyses to conform. The alternative is to  
15 say each side can present its theory of damages as of the date  
16 it feels is appropriate.

17 THE COURT: Explain to me why you would have to  
18 remember do your valuations. It would seem to me that you  
19 would have to address the plaintiffs valuations based on this  
20 slow death scenario and that your expert would have to either  
21 attack that disagree with it and present testimony in that  
22 regard.

23 MR. BERGER: Our experts have already done that when  
24 they filed sur rebuttal reports. In other words Mr. Taylor  
25 filed his original report where he brought in this theory of

1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 instruction that you would give. If you give that  
2 instruction, the date that the plaintiff's experts have  
3 measured damages of January 5 is going to be irrelevant. And  
4 so there would be no reason for them to put that evidence in  
5 the record that is sour position, Your Honor.

6 THE COURT: Up above February should be May.

7 THE COURT: Would Norfolk southern be able to say to  
8 the jury, for example, plaintiffs have argued that May the  
9 May 26th date is the appropriate day, we think that that is  
10 not appropriate and have the jury pick what they believe is  
11 the appropriate valuation?

12 MR. RUSS: Your Honor, I don't believe that would be  
13 appropriate because the Court is going to have to issue an  
14 instruction to the jury on the law. And the question of law  
15 comes back to the Court. That is the very reason why we did  
16 an alternate. They could have done the same thing.

17 MR. BERGER: Your Honor, on this issue I would ask  
18 the Court, I know the court had wanted to consider this  
19 issue, ask the Court either clarify its ruling that we are  
20 allowed to have our experts present their theories which would  
21 include the valuation of the company prior to the derail ~ment  
22 or reset a schedule, a reasonable scheduled to give us an  
23 opportunity to redo our expert reports to accommodate some  
24 other date. They have never moved to exclude our evidence on  
25 grounds of relevance or because of unreliable based on the

## 1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 choice of the derail ~ment date. We would be highly unfairly  
2 prejudiced at this point because if the Court's ruling stands  
3 and our experts cannot revise their reports, the Court has  
4 perhaps unwillingly knocked out about 90 to 95 percent of the  
5 valuation information in our expert's reports. And we don't  
6 think /PHAO\*EUD immediately prior to trial that would be  
7 appropriate. Your Honor, if I may turn unless you have more  
8 questions on that I will turn very briefly to 986. The  
9 point under 986 was not simply that these were alternate  
10 opinions, but that they came on December 7th, 2007. If 2  
11 Court does allow any alternate opinions from Mr. Taylor, they  
12 /HAO should not be those that were revised just now we feel  
13 that this is classic sandbagging. On two of their alternates  
14 which remain, they have increased their damages claim by more  
15 than 48 million dollars. And they explained these changes  
16 arise from the correction of errors, the size of the errors  
17 are monumental but what is more important is are the relevant  
18 dates. In their response of page 2 which was docket entry 99  
19 99 they explained that one of these errors is an 85 .5  
20 million dollar gain on insurance settlement for a period  
21 ending of May 2006. And the other mistake or they corrected  
22 was a 71 /\*PLT 8 million dollar loss on I will question  
23 /STKAEUGS net was over as of August 2006. So, those  
24 transactions that they say were recorded in error were known  
25 back in 2006. It is not something that happened at the end

## 1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 of 2007. And another explanation that Mr. Taylor gave last  
2 week when I deposed him about these change /SES that he  
3 changed his decision about how the tax effect various income,  
4 originally tax effected it then realized he was no longer  
5 going to do so a strategy call it happened to add another 24  
6 million dollars to those alternate damages calculations. And  
7 they have an obligation under 26 E to seasonably supplement  
8 their disclosures not to do it at the last minute. I think  
9 the Southern State's factors all point in favor of excluding  
10 these corrected numbers if any alternate numbers go to the  
11 jury from Mr. Taylor because we obviously are surprised by  
12 this. There is disruption, there is a lack of ability to  
13 cure given the present time frames. Southern states says the  
14 rules are designed to allow the /AEU upon end to develop  
15 counter testimony. And it complicates our expert's task  
16 right now of trying to counter test the money to allow the  
17 alternates in addition to the main or real opinion. Southern  
18 states says what is the explanation for this? And there is no  
19 explanation. We made a mistake, it is not an explanation.  
20 They don't say why they made the mistake how they made the  
21 mistake what data that they should have had that they didn't  
22 get or Mr. Taylor saying I just changed my mind on the tax  
23 issue, that is not an explanation. And finally, the last  
24 factor is important, but soutSouthern St says that if it is  
25 important, it should have been disclosed in a timely manner.

1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 And this is clearly not important because these are only the  
2 alternate opinions of December 7, 2007, not his real  
3 opinion. Thank you. opinion. Thank you.

4 THE COU

5 MR. RUSS: Let me address immediately the issue of  
6 whether the corrected report was timely.

7 THE COURT: Rather the what in I didn't hear what  
8 you just said.

9 MR. RUSS: Let me address immediately the issue of  
10 whether the corrected report was filed timely.

11 THE COURT: Okay.

12 MR. RUSS: To do that I will put up a document. The  
13 significant part of the Cronenbchr really starts later on here  
14 we go. The taylor rebuttal report was filed March 23, '07,  
15 his deposition was taken June 4th, 07 '07, th was a Daubert  
16 hearing on 9-7-07, his report as you will hear later  
17 according to his testimony had not changed between March 23,  
18 07 '07 the time of his Daubert hearing on September 7, '07.  
19 Summary judgment hearing on September 14, at which the court  
20 was told, opposing counsel were told what everybody knew  
21 which is that the taylor damage calculation report would  
22 change. Mr. Easter Lynn made that expressed statement on the  
23 record, we quoted it in our brief. It was known that this  
24 liquidation would was in process, be additional transactions  
25 and occurrences that would take place from that date forward

## 1/17/2008 Motion Hearing (Avondale v Norfolk Southern) [ROUGH]

1 bound by statements made during the insurance adjustment  
2 process that follow the derailment under South Carolina law  
3 Avondale is a true party in interest and factory /PHAOU  
4 through all has been allowed to intervene in the action solely  
5 because Avondale and factory mutual conceded previously that  
6 Avondale would not adequately represent factory mutual's  
7 interest in the subrogation claim; therefore, I find the  
8 statements that have been made by factory mutual after the  
9 derailment are not admissible as admissions by afterAvondale  
10 federal Rules of Evidence 8 /01(d)1. -- I mean 801(d) 2 A.

11 No folk's motion to strike alternate damages calculations  
12 in corrected taylor report which is docket entry 986. I am  
13 going to take this motion under advisement pending briefing  
14 from Avondale as to whether it wishes to submit argument  
15 submitting alternate damage calculations to the jury in  
16 relation to the slow death scenario. By way of v/SRA Clary  
17 if I case Norfolk Southern is entitled to as a defendant to  
18 present an alternative theory to the jury and argue to the  
19 jury that its measure of damages should be applied rather than  
20 the measure that has been advanced by afteAvondal Not measure  
21 theory.

22 Defendant's motion to strike taylor and for other  
23 appropriate relief including issuance of show cause order  
24 which is entry number 998 and Norfolk Southern's motion to  
25 strike corrected Meyer report which is entry number 108 1,